this Court's AEA preemption standards but the principles governing ripeness and facial preemption more generally, and conflicts with other circuits' decisions.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 04-575

IN THE

Supreme Court of the United States

DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality, *et al.*,
Petitioners,

v.

PRIVATE FUEL STORAGE, L.L.C., and SKULL VALLEY BAND OF GOSHUTE INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This Court should reject the Government's recommendation against granting certiorari in this case just as it rejected the similar negative recommendation in the Government's invitation brief in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *See* Pet. Reply Br. 9. Here, as there, the Tenth Circuit has intruded on prerogatives left to the States in a way that warrants review. Indeed, the intrusion here is much greater than in *Silkwood*. It encompasses not only an incorrect wholesale preemption of a raft of state laws under the Atomic Energy Act (AEA), but also a violation of the far more general ripeness and facial-challenge doctrines, which should have entirely barred adjudication of the state laws' validity right now—when the state laws have not been applied and may never be applied—and, in any event, should have precluded *facial* invalidation of the state laws as a whole—because the laws actually at issue are readily capable of valid application.

"Our federal system, with its high regard for the several states' powers of governance, requires that judges not preempt state laws lightly." K. Starr, P. Higginbotham, S. Seymour, W. Clark, J. Criswell & J. Sneed, *The Law of Preemption* 40 (1991). The Tenth Circuit's ripeness ruling, its disregard of facial-invalidity standards, and its sweeping view of AEA preemption all breach the vital principle barring needless federal court displacement of state law, as well as contradict decisions of this Court and other circuits. The Federal Government's brief, which at bottom rests on an over-expansive view of AEA preemption that this Court has already twice rejected (in *Silkwood* and in *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190 (1983)), offers no sound basis for denying review of the Tenth Circuit's incautious, broad-brush abrogation of numerous state laws, which can be applied (if they ever will be applied) to serve traditional interests left to the States under the AEA.

I. RIPENESS

Two categories of serious contingencies make respondents' challenges unripe for adjudication: whether respondents' project will obtain the multiple needed federal approvals; and how the various state laws will be applied by Utah if and when all the federal approvals occur. Moreover, the record is literally devoid of evidence of hardship from postponing adjudication, let alone any hardship matched to each challenged law, because respondents presented no evidence. The Government's discussion of ripeness simply does not come to grips with these compelling reasons for avoiding the extraordinary act of global adjudication of Utah's multifarious state laws.

A. The Government does not deny that "at least two" (Pet. 4) federal approvals are needed for respondents' project. And, what is critical, it nowhere denies that there is genuine uncertainty about whether this singular project will obtain the federal approvals it needs. Thus, although the Nuclear Regulatory Commission has now authorized issuance of a license, the decision is subject to judicial challenge (SG Br. 6 n.2); in addition, multiple contingencies remain at the Department of the Interior—approvals routed through the Bureau of Indian Affairs and through the Bureau of Land Management.[1] The Government rightly does not predict how those processes, which may take years, will turn out.

The case is thus sharply different from *Pacific Gas*, where not only was the effect of the state-law moratorium undisputed (it banned new power plants because there *was* no adequate waste-storage plan) but there was also no stated uncertainty that federal approvals for all power plants might

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[1] The latter is subject to a federal statute requiring Defense Department studies before Interior takes certain steps to alter resource management plans for "Utah national defense lands" that, like the site here (Pet. 4), are near the military's Utah Test and Training Range and Dugway Proving Ground. National Defense Authorization Act for Fiscal Year 2000, § 2815, Pub. L. No. 106-65, 113 Stat. 512, 852.

be withheld so as to moot the issue of the state ban. *See* Pet. 18. Here, both forms of uncertainty are serious ones, thus defeating the Government's effort (SG Br. 7 n.3) to distinguish the plain principle of *Texas v. United States*, 523 U.S. 296, 300 (1998), quoted at Pet. 16.

Moreover, there is simply no evidence of hardship to respondents before obtaining the needed federal approvals: respondents literally introduced no such evidence whatever. Pet. 8. In the absence of *any* concrete evidence, all that is left is the abstract lawyers' argument, of near universal applicability, that legal uncertainty creates hardship for a party contemplating action dependent on the resolution of that uncertainty. That is precisely what this Court said in plain terms was not enough in *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 811 (2003), quoted at Pet. 18, as confirmed by the Ninth Circuit in *Natural Resources Defense Council v. Abraham*, 388 F.3d 701, 706 (9th Cir. 2004). This Court should correct the Tenth Circuit's finding of ripeness when it is genuinely uncertain whether a ruling will ever matter and there is no evidentiary showing of concrete hardship from waiting before the federal court performs the delicate task of adjudicating the validity of state statutes.

B. The Government barely mentions the entire second category of contingencies—how the state laws will be applied. What it does say is flawed for at least two reasons over and above its wholly unsupported assertion (without any evidentiary record) that the laws are "highly burdensome and costly" and would lead to abandonment of the project if upheld (SG Br. 9).

First, the Tenth Circuit decision, like the Government's brief, treats "[t]he challenged Utah statutes" (SG Br. 9) in wholesale fashion. But ripeness analysis requires separate consideration of the various state laws. *Pacific Gas* separately analyzed the ripeness of AEA-preemption challenges to

two California provisions enacted as part of the same legislation (the 1976 Warren-Alquist Act), 461 U.S. at 197-98, and found one ripe for adjudication and the other not. 461 U.S. at 201-03. The Government, like the Tenth Circuit, has not separately addressed ripeness for each law at issue.[2]

Second, and more broadly, the Government wholly ignores one vital policy of ripeness doctrine, generally applicable but of heightened importance in *state*-law cases: allowing the administrators of the challenged law to act in a way that avoids the potential problems. That policy was stressed by this Court as an essential component of ripeness analysis in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), *see* Pet. 16-17, and the Government itself successfully invoked it in *Abraham*, 388 F.3d at 705-07. *See* Brief for Appellants, 2004 WL 545961, at 15-20. The Tenth Circuit decision conflicts with that important policy, because how the various Utah laws will be applied (if they are ever applied) is subject to numerous uncertainties—which are summarized at Reply Br. 3, but not addressed by the Government. Those uncertainties explain the wholly unsupported and abstract character of assertions of harm and conflict with federal policy in this case, making this case a good example of the need to await application before adjudication.

This Court in *Schiro v. Smith*, 74 U.S.L.W. 3246, No. 04-1475 (Oct. 17, 2005), recently confirmed the strength of the principle that federal courts should not displace state authority, in the name of federal law, in advance of the State's

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[2] The Government, discussing harm, cites one Utah provision as having played a role in an NRC proceeding (SG Br. 8), but that provision, as Utah expressly told the Tenth Circuit, will *not* apply to respondents' project if federal authority to authorize that project is confirmed, and hence cannot impose any hardship on respondents. *See* Pet. 6, 24-25. That provision serves legitimate interests, *see* Pet. 24 & n.10; *United States v. Olson*, No. 04-759 (S. Ct. Nov. 8, 2005), slip op. 4 (Good Samaritan liability), but never should have been reached by the Tenth Circuit.

application of its authority in a particular case. Although *Schiro* and this case arise in different contexts, the principle is the same. *Schiro* involved a federal habeas petition from an Arizona prisoner who alleged that he was mentally retarded and therefore protected from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). After the Ninth Circuit ordered Arizona to use a jury to decide the prisoner's mental capacity (unless jury trial is waived), this Court summarily vacated the Ninth Circuit decision, explaining that *Atkins* left the initial choice of implementation measures to the States and

> "[w]hile those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition." Slip op. 2, 74 U.S.L.W. 3246.

Here, Utah has not even had a chance to apply its various laws. When Utah does apply its laws, those applications "might, in their application, be subject to constitutional challenge" under the Supremacy Clause; but at present, the Tenth Circuit acted improperly when it "preemptively imposed" its view of federal-law constraints. *Id.*

II. PREEMPTION

A. The Government defends the Tenth Circuit's failure to follow the usual strict standard for facial challenges by trying to distinguish *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), on two grounds. It states that the federal law at issue there "contemplated state regulation" in the area; and, more categorically, it says that *Granite Rock* "did not involve any issue of *field* preemption." SG Br. 11-12 (emphasis by Solicitor General). But the first point is no distinction at all: *Pacific Gas* and *Silkwood*, in rejecting preemption challenges, make clear that the AEA contemplates that some state laws permissibly apply to nuclear facilities and others do not, thus requiring, as in *Granite*

Rock, a judgment about which of the particular state laws fall on which side of the line. And the Government's broader point, that facial invalidation standards do not apply to *field* preemption, is baseless.

Contrary to the Government's apparent suggestion, the strict standards for facial challenges are not somehow peculiar to conflict preemption, or even to preemption law. They govern invalidity challenges generally, whether they rest on the Supremacy Clause or anything else. While there are certain overbreadth exceptions to the rule that facial invalidation requires invalidity in all applications—for First Amendment claims, perhaps in the abortion area (an issue pending in *Ayotte v. Planned Parenthood of Northern New England*, No. 04-1144)—the Court has stressed the breadth of the rule and the important reasons to limit exceptions, which in no way cover an AEA preemption claim. *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004). The Government itself, in *Ayotte*, vigorously and categorically endorsed the broad applicability of the strict standard for facial invalidation.[3] As for the idea that a federal court may globally invalidate a host of state laws on their face, even those which would be valid, and force the State to try again with a more "narrowly tailored" approach (SG Br. 14 & n.6), the suggestion simply turns on their head the federalism and separation-of-powers principles that underlie the facial-challenge standard as applied to state laws.

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[3] The Government wrote: "Under the standard articulated in *United States v. Salerno*, 481 U.S. 739 (1987), a plaintiff bringing a facial challenge to a statute (and thus seeking to render it void in all its applications) must demonstrate that the statute is in fact invalid in all its applications." U.S. *Amicus* Brief in No. 04-1144 (August 2005), at 7; *id.* at 9 ("The 'No Set of Circumstances' Test Is The Correct Test For Facial Challenges"); 10 ("the *Salerno* standard is compelled by core limitations on the scope of the judicial power, as well as broader separation-of-powers principles"). Even if an exception to the facial-invalidation standard applies in *Ayotte*, no comparable departure can be justified for the present commercial context without destroying the standard altogether.

The Tenth Circuit did not apply the governing facial-challenge standard. Its decision conflicts with other circuits' decisions, because the Government distinguishes them only on the same two grounds on which it incorrectly seeks escape from the facial-challenge standard. SG Br. 12 n.5. And, unless corrected, the Tenth Circuit decision will invite further overbroad federal court inurusions on state prerogatives.

B. The Government's remaining position on the merits rests on its persistence in pressing an over-aggressive view of AEA preemption, one that cannot be squared with the decisions of this Court or other circuits. The Government's brief pervasively relies on three alleged features of the Utah laws as sufficient for preemption: that they apply only to ("target") a nuclear facility; that their motivation (aim, purpose) is to block such a facility; and that they are "motivated by concerns about nuclear safety" (SG Br. 12). *See id.* at 10-19. None of these allegations, however, supports AEA preemption.

The first two grounds are conclusively rebutted by *Pacific Gas*. Although the Government seems to suggest otherwise (SG Br. 13-14), the California law at issue in *Pacific Gas* on its face (a) was utterly specific to ("targeted" at) nuclear power plants and (b) blocked their construction. Yet this Court upheld the law against AEA preemption, because the law served a legitimate state interest other than (though obviously intertwined with) the regulation of safety: avoiding the adverse economic consequences of operating a nuclear plant without satisfactory nuclear-waste disposal. Moreover, despite the Government's attempt to suggest otherwise (SG Br. 17-18), not only *Pacific Gas* but decisions of the Seventh and Second Circuits (*see* Pet. 27-28; Pet. Reply Br. 7-8) make clear that a motivation to block a nuclear facility is not a basis for preemption.

Silkwood, too, precludes preemption of state impositions on the ground that they are focused specifically on a nuclear facility. *Silkwood* upheld the authority of juries acting under

state law not only to award compensatory damages but even to award punitive damages for injuries caused by what the jury determined to be radiological safety deficiencies at a particular nuclear facility. No law or logic allows an individual jury, "a quintessential governmental body" exercising "the power . . . of the government that confers the court's jurisdiction" (*Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991)), to make such facility-specific judgments, about safety practices and the provision of proper monetary relief, yet precludes the State itself from making such judgments (which the liability laws at issue here do). What matters is the nature of the action taken—providing damages, in *Silkwood*—not how "targeted" it is (SG Br. 13) or whether the standards pre- or post-date the 1950s AEA.

The Government's position therefore comes down to its view that a "motivat[ion] by concerns about nuclear safety" suffices for preemption. SG Br. 12. But that is not the law. *Silkwood* squarely preserved state authority to take a certain type of governmental action (providing damages, even punitive damages) based specifically on such concerns. Even the passage from *English v. General Elec. Co.*, 496 U.S. 72 (1990), quoted by the Government (SG Br. 12) makes "purpose" merely "relevant" (SG Br. 13): it says that "part of the pre-empted field is defined by reference to the purpose of the state law," 496 U.S. at 84, without saying that safety-based concerns that partly motivate an overall enactment invalidate each particular measure in that enactment regardless of what each such measure actually *does*. Moreover, this Court in *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992), treated what the laws actually *did* (there, regulate worker safety practices) as dispositive, and immediately following its quotation from *English*, the Court said: "we have refused to rely solely on the legislature's professed purpose." *See also id.* at 107.